

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
IN TACOMA

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HP TUNERS, LLC,	)	
	)	
Plaintiff,	)	No. CV17-5760BHS
	)	
v.	)	
	)	
KEVIN SYKES-BONNETT and	)	
SYKED ECU TUNING,	)	
INCORPORATED,	)	
	)	
Defendants.	)	

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TRO HEARING

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August 29, 2018

BEFORE THE HONORABLE BENJAMIN H. SETTLE  
UNITED STATES DISTRICT COURT JUDGE

APPEARANCES:

For the Plaintiff:	Andrew Bleiman
	MARKS & KLEIN
	Stephen Leatham
	HEURLIN POTTER JAHN LEATHAM
	HOLTMAN & STOKER
For the Defendants:	John Whitaker
	Tyler Kendrick
	LANE POWELL

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10:10:04AM 25

10:10:04AM 1 THE CLERK: This is the matter of HP Tuners  
10:10:09AM 2 versus Sykes-Bonnett, Cause No. CV17-5760BHS. Counsel,  
10:10:12AM 3 please make an appearance.

10:10:13AM 4 MR. BLEIMAN: Good morning, your Honor. Andrew  
10:10:15AM 5 Bleiman on behalf of HP Tuners. Along with me today is  
10:10:19AM 6 Keith Prociuk of HP Tuners and Steve Leatham.

10:10:24AM 7 THE COURT: Good morning.

10:10:25AM 8 MR. WHITAKER: Good morning, your Honor. John  
10:10:26AM 9 Whitaker. Beside me is Kevin Sykes-Bonnett of Syked  
10:10:30AM 10 Tuning. Beside him is Tyler Kendrick, an associate at the  
10:10:35AM 11 firm Lane Powell.

10:10:36AM 12 THE COURT: Good morning. This matter was set  
10:10:37AM 13 for hearing to take up two motions for temporary  
10:10:40AM 14 restraining order, each party having filed one. We will  
10:10:48AM 15 take up first the plaintiff's motion, and then the  
10:10:55AM 16 defendants' motion. So, Mr. Bleiman, I will hear from  
10:11:02AM 17 you.

10:11:03AM 18 MR. PROCIUK: Thank you, your Honor. Is it all  
10:11:05AM 19 right if I stay at counsel table, or would you like me to  
10:11:07AM 20 go to the podium?

10:11:07AM 21 THE COURT: You can stay at counsel table,  
10:11:09AM 22 because there may be some back and forth here.

10:11:13AM 23 MR. BLEIMAN: Thank you. Your Honor, the  
10:11:15AM 24 defendants misled this court almost a year ago in  
10:11:17AM 25 connection with our initial application for temporary

1       restraining order, and have engaged in a pattern and  
2       practice of concealment and nondisclosure throughout the  
3       course of this litigation.

4               It took an anonymous informant coming forward to  
5       provide us information that the defendants should have  
6       provided long ago in accordance with the Federal Rules of  
7       Civil Procedure. However, instead of complying with their  
8       obligations and being forthright and compliant in their  
9       disclosures in discovery, defendants made material  
10      misrepresentations in connection with their answer and  
11      have grossly violated the federal rules throughout the  
12      course of this litigation.

13              For example, in their answer, in Paragraph 69, the  
14      defendants denied an allegation that they had knowingly  
15      created, generated, obtained, used, fraudulent application  
16      keys that were not generated by HP Tuners. In their  
17      answer at Paragraph 73 of the complaint they denied  
18      possessing the HP Tuners key generator tool. In  
19      Paragraphs 75 and 81 they denied adding extra licenses to  
20      existing interfaces. However, in connection with this  
21      renewed emergency motion for TRO, we have declarations of  
22      both Mr. Sykes-Bonnett and Ken Cannata where they admit  
23      that defendants have the license generator tool and have  
24      used it to generate licenses for third parties.

25              There is many other examples of -- Given their

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10:12:50AM 1 admitted possession of HP Tuners' intellectual property in  
10:12:56AM 2 these declarations --

10:12:59AM 3 THE COURT: Now the contention is that there was  
10:13:02AM 4 an authorized disclosure, correct? That's what defense is  
10:13:05AM 5 arguing?

10:13:07AM 6 MR. BLEIMAN: Unauthorized?

10:13:09AM 7 THE COURT: It was an authorized --

10:13:13AM 8 MR. BLEIMAN: I don't believe that they have made  
10:13:14AM 9 that argument, your Honor. What they have said is  
10:13:16AM 10 Mr. Cannata did provide it to him, but nowhere did  
10:13:21AM 11 Mr. Cannata state in his declaration that he was  
10:13:23AM 12 authorized to do it. He didn't state that he did it  
10:13:26AM 13 during the course of time prior to him leaving HP Tuners,  
10:13:33AM 14 because the timeline doesn't add up.

10:13:35AM 15 As we have pointed out, this issue that he claims  
10:13:39AM 16 existed regarding the unpaid credits or the frustration  
10:13:42AM 17 that Mr. Sykes-Bonnett had regarding not having received  
10:13:46AM 18 credits was still an issue in November of 2016, after the  
10:13:51AM 19 date that Mr. Cannata was no longer with the company.

10:13:56AM 20 Mr. Sykes-Bonnett posted a message on Facebook  
10:14:00AM 21 complaining about HP Tuners, complaining about how he was  
10:14:02AM 22 owed credits. It was November 15th, 2016, I believe.  
10:14:06AM 23 Mr. Cannata was out of the company in October. On that  
10:14:09AM 24 very same day Mr. -- HP Tuners did issue those credits to  
10:14:15AM 25 Mr. Sykes-Bonnett, and he posted a message then and there,

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10:14:20AM 1 as well, that the debts, quote, have been settled. The  
10:14:24AM 2 timeline doesn't add up.

10:14:26AM 3 They have also admitted to those allegations in the  
10:14:28AM 4 complaint, that this issue existed after Mr. Cannata was  
10:14:34AM 5 no longer with the company.

10:14:36AM 6 Based on their own admissions, and the omissions, I  
10:14:41AM 7 would say, from Mr. Cannata's declaration that he did this  
10:14:46AM 8 before he left HPT, demonstrate this was not an authorized  
10:14:52AM 9 transfer of this information. I don't believe that is  
10:14:56AM 10 even something that has been argued in their papers. They  
10:14:58AM 11 hint or suggest that maybe it was, but they don't provide  
10:15:02AM 12 any particulars, certainly no evidence, to demonstrate  
10:15:07AM 13 that it was an authorized disclosure of our information.

10:15:11AM 14 As far as the other types of concealment and  
10:15:19AM 15 misdirection that has been involved here, your Honor, in  
10:15:23AM 16 connection with the initial disclosures that the defendant  
10:15:28AM 17 served in this matter, Ken Cannata is identified as a  
10:15:31AM 18 person on the initial disclosures. "Address: Current  
10:15:35AM 19 contact information unknown." He was working with them.  
10:15:38AM 20 They were communicating with him by email. He was one of  
10:15:41AM 21 their partners. Certainly they knew exactly where he was  
10:15:44AM 22 and could have provided that information.

10:15:47AM 23 They also state, "The subjects of information, may  
10:15:49AM 24 have knowledge about plaintiff's products and their  
10:15:53AM 25 development and any lack of any wrongful communications

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10:15:56AM 1 between himself and defendants." They were working  
10:15:59AM 2 together. These declarations now demonstrate they were  
10:16:02AM 3 working together. Mr. Cannata states in his declaration  
10:16:06AM 4 he was helping Mr. Sykes-Bonnett with the development of  
10:16:11AM 5 the hardware interface.

10:16:13AM 6 But nowhere is there any disclosure, identification.  
10:16:20AM 7 Bobbie Cannata, one of their business partners, Ken's  
10:16:23AM 8 wife, is not listed on their initial disclosures. This  
10:16:26AM 9 was intentional concealment so that we couldn't discover  
10:16:29AM 10 what was really going on.

10:16:31AM 11 Now, in discovery, the same type of misdirection and  
10:16:36AM 12 concealment has been taking place to date. They have now  
10:16:41AM 13 admitted they have our zip drive with all of our code,  
10:16:45AM 14 they have the key generator tool, they have different HPT  
10:16:49AM 15 documents and information, and that they have used it.

10:16:53AM 16 However, there has been no production of any  
10:16:55AM 17 electronically-stored information or documents on those  
10:16:58AM 18 issues. We have been doing discovery for nine months.  
10:17:02AM 19 They have had this stuff since before this case was ever  
10:17:04AM 20 filed. Yet, there has been no disclosure, there has been  
10:17:09AM 21 no production, there has been no identification that they  
10:17:11AM 22 even have any of these items. It only took, again,  
10:17:15AM 23 someone coming forward to tell us about this that we now  
10:17:18AM 24 know this. Otherwise, this concealment would still be  
10:17:22AM 25 occurring.

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10:17:23AM 1 Defendants had affirmative obligations to disclose  
10:17:27AM 2 this type of information under Rule 26. The federal rules  
10:17:32AM 3 are designed to foster the exchange of information and  
10:17:35AM 4 prevent this type of gamesmanship and concealment from  
10:17:39AM 5 going on.

10:17:40AM 6 THE COURT: Let's focus a little bit on the  
10:17:41AM 7 temporary restraining order.

10:17:43AM 8 MR. BLEIMAN: I'm sorry, your Honor. That's  
10:17:45AM 9 where I was getting to. And that's why the TRO should be  
10:17:49AM 10 granted, because it is indisputable that the defendants  
10:17:51AM 11 are in possession of our confidential and proprietary  
10:17:59AM 12 information from Ken Cannata, one of our former owners.  
10:18:04AM 13 It includes but isn't limited to a flash drive with all of  
10:18:06AM 14 our code; the key generator tool; information about our  
10:18:09AM 15 MPVI interface, an admin version of our software.

10:18:14AM 16 They have access to -- take steps to unkill  
10:18:20AM 17 interfaces. They have been selling hacked interfaces.  
10:18:24AM 18 There is posts from Mr. Sykes-Bonnett on Facebook where he  
10:18:29AM 19 is advertising for sale an interface for \$4,500 that is  
10:18:35AM 20 loaded with HP Tuners credits. It is indisputable they  
10:18:40AM 21 are in possession of this USB drive, as I said. They have  
10:18:44AM 22 the key generation tool and program, which is our most  
10:18:48AM 23 valuable intellectual property that the company has.

10:18:53AM 24 Essentially, what happens, your Honor -- And I think  
10:18:57AM 25 there has been some discussion of the business in the

10:19:02AM 1 various papers. But an auto enthusiast, or a shop, or a  
10:19:07AM 2 person will buy credits that allow them to tune their  
10:19:11AM 3 vehicle, which is a mechanism to actually connect to the  
10:19:16AM 4 onboard computer of a vehicle and adjust the settings of  
10:19:21AM 5 that vehicle.

10:19:23AM 6 You can, for example, make it so the car can't go  
10:19:26AM 7 over 50 miles an hour. So a fleet of trucks, some  
10:19:29AM 8 business can make it so that vehicles can't go over a  
10:19:32AM 9 certain speed limit. But you can essentially adjust the  
10:19:38AM 10 settings of the car's performance.

10:19:40AM 11 And then you use the credits in order to be able to  
10:19:43AM 12 restart the vehicle. Because normally when you make those  
10:19:46AM 13 changes to the computer, the vehicle will not let it  
10:19:49AM 14 restart. So we sell credits that allow you to tune the  
10:19:52AM 15 vehicle and then restart the car.

10:19:56AM 16 Substantially, all of our revenues are related to  
10:19:59AM 17 this key generation and the purchase of credits. They  
10:20:02AM 18 have the ability to do that without paying for them.  
10:20:06AM 19 That's what this key generator tool gives them.

10:20:09AM 20 They have been giving that and selling those credits  
10:20:12AM 21 to third parties so they don't have to buy them from us.

10:20:16AM 22 THE COURT: How long have they been doing this?

10:20:19AM 23 MR. BLEIMAN: We don't know exactly. We  
10:20:21AM 24 suspected they were doing it. There was advertisements  
10:20:25AM 25 for the interfaces. We didn't know they had the actual



10:20:28AM 1 key. Again, this has been concealed for more than a year  
10:20:32AM 2 from us. There are anonymous people who are selling  
10:20:37AM 3 credits on the internet. We believe that to now be  
10:20:42AM 4 Mr. Sykes-Bonnett. They have the actual key, and he has  
10:20:46AM 5 admitted to having it, and to using it to generate keys  
10:20:49AM 6 for third parties.

10:20:50AM 7 THE COURT: Why aren't money damages sufficient?

10:20:55AM 8 MR. BLEIMAN: This can undermine our entire  
10:20:57AM 9 business, your Honor.

10:20:57AM 10 THE COURT: Is that what has happened?

10:21:00AM 11 MR. BLEIMAN: It might. We don't know yet the  
10:21:03AM 12 extent of the damage. Certainly his ability to generate  
10:21:06AM 13 keys for anybody without having them -- pay us, or his  
10:21:12AM 14 potential release of that key generator tool publicly or  
10:21:18AM 15 to other third parties could undermine our entire business  
10:21:20AM 16 and result in no one having to come to us to actually  
10:21:24AM 17 purchase a credit, because they can use this tool to  
10:21:27AM 18 generate the credits for free.

10:21:29AM 19 THE COURT: Can the court, though, enter a  
10:21:32AM 20 restraining order on a can, or might, or may basis?

10:21:36AM 21 MR. BLEIMAN: In this case, given the irreparable  
10:21:40AM 22 harm that we will suffer, given the balance of the  
10:21:42AM 23 equities, given our likelihood of success on the merits  
10:21:46AM 24 that this is proprietary information that he should not  
10:21:50AM 25 possess, I believe so.

10:21:53AM 1 The harm here -- He is doing these things. He has  
10:21:57AM 2 admitted to doing these things in his declaration. He  
10:22:01AM 3 says, "I have the tool and I have used it to generate  
10:22:05AM 4 licenses for third parties." He should not be in  
10:22:08AM 5 possession of the tool. He shouldn't have the capability  
10:22:11AM 6 to generate licenses for third parties. Only we should  
10:22:15AM 7 have that ability. This is our proprietary information.  
10:22:19AM 8 This is not his. It belongs to us.

10:22:27AM 9 The value of this intellectual property cannot be  
10:22:30AM 10 calculated. We are talking potentially hundreds of  
10:22:34AM 11 millions of dollars. This is not something that doesn't  
10:22:41AM 12 have any value. This is a cornerstone of the business and  
10:22:46AM 13 a piece of intellectual property that he should not have.

10:22:51AM 14 In addition, our software, our source code, the admin  
10:22:55AM 15 version of the software, which he admits to possessing, is  
10:22:59AM 16 not his.

10:23:01AM 17 Now, the defendants have made an issue of, "Examine  
10:23:05AM 18 the source codes." That is not determinative. What has  
10:23:09AM 19 happened here, your Honor, is that he has been able to use  
10:23:11AM 20 our source code to add additional vehicles to support on  
10:23:19AM 21 these offerings that he has. So he has been able to take  
10:23:23AM 22 our admin version of software, whereas he previously was  
10:23:28AM 23 limited to Dodge vehicles, was Mr. Sykes-Bonnett's  
10:23:33AM 24 specialty.

10:23:34AM 25 Since Mr. Cannata has been involved, and since their

10:23:37AM 1 receipt of our code, what he has been able to do is take  
10:23:40AM 2 our code, see what we were doing, how we were implementing  
10:23:46AM 3 algorithms into the software, and he has incorporated that  
10:23:52AM 4 into his own software, which allows him to support  
10:23:55AM 5 additional vehicles that he couldn't previously support.  
10:23:58AM 6 So he has misappropriated our intellectual property and  
10:24:04AM 7 used our source code to incorporate into the products that  
10:24:08AM 8 he has had.

10:24:08AM 9 With regard to this cable, again, he had our  
10:24:13AM 10 communication protocol, and has duplicated that in the  
10:24:16AM 11 product that he is currently selling. So he has taken our  
10:24:19AM 12 intellectual property, the way that we communicate with --  
10:24:23AM 13 the communication protocol from our MPV, and he is now  
10:24:29AM 14 using that in his Syked eliminator cable. It is a rip-off  
10:24:33AM 15 of our intellectual property.

10:24:35AM 16 The reason why he is out there able to sell these  
10:24:38AM 17 products for less than we are selling, and compete with  
10:24:41AM 18 us, and do so without the ten-plus years of development  
10:24:45AM 19 that we have taken is because he doesn't have any  
10:24:47AM 20 development costs. He has taken our stuff and used it for  
10:24:51AM 21 his own. So he is unfairly competing with us on that  
10:24:59AM 22 basis.

10:24:59AM 23 As to the temporary restraining order, as I have  
10:25:04AM 24 said, this isn't just about the software. He has the key  
10:25:08AM 25 generator. He has the flash drive with all of our

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10:25:15AM 1 information on it. He has released, we believe, cracked  
10:25:18AM 2 versions of our software based on his possession of the  
10:25:21AM 3 admin version of our software. So by virtue of his  
10:25:27AM 4 possession of the admin version, he is able to crack our  
10:25:31AM 5 software to make it so people can tune their vehicles  
10:25:35AM 6 without logging into the internet and purchasing the  
10:25:39AM 7 credits from us.

10:25:40AM 8 THE COURT: If the court grants the temporary  
10:25:42AM 9 restraining order, what is your response to the  
10:25:45AM 10 defendant's contention that it would put him out of  
10:25:48AM 11 business?

10:25:50AM 12 MR. BLEIMAN: We disagree. First of all, the  
10:25:54AM 13 temporary restraining order would be in place until such  
10:25:58AM 14 time we can have a hearing on the preliminary injunction,  
10:26:01AM 15 which we would set today.

10:26:02AM 16 THE COURT: When might that be?

10:26:04AM 17 MR. BLEIMAN: As soon as practical. There is  
10:26:06AM 18 discovery -- some limited expedited discovery that we  
10:26:10AM 19 would need.

10:26:10AM 20 THE COURT: Roughly, what are we talking about?  
10:26:12AM 21 How much time for discovery before we can have --

10:26:16AM 22 MR. BLEIMAN: We believe in six to eight, ten  
10:26:19AM 23 weeks this should be set for a hearing on the preliminary  
10:26:22AM 24 injunction.

10:26:23AM 25 THE COURT: An evidentiary hearing taking

10:26:29AM 1 testimony?

10:26:31AM 2 MR. BLEIMAN: Correct. We know he has cloned  
10:26:33AM 3 interfaces of ours using our software, and he is selling  
10:26:37AM 4 it. He has posted on Facebook solicitations for the  
10:26:46AM 5 purchase and sale of hacked interfaces of ours.

10:26:50AM 6 Now, with regard to your question about, does this  
10:26:54AM 7 put him out of business? Again, it does limit things that  
10:27:00AM 8 he can do here between now and the time of the preliminary  
10:27:03AM 9 injunction.

10:27:04AM 10 But there are other components to the temporary  
10:27:08AM 11 restraining order, as well, relating to our information,  
10:27:13AM 12 return of information, having some of the intellectual  
10:27:18AM 13 property, like the cable, tendered for forensic  
10:27:22AM 14 examination.

10:27:23AM 15 There are other components to the temporary  
10:27:25AM 16 restraining order, as well, that are equally as important  
10:27:34AM 17 beyond him not selling his cable for that period of time.  
10:27:39AM 18 I think there are a number of components to the  
10:27:42AM 19 restraining order that we are asking for that would also  
10:27:46AM 20 be properly entered and not impact his business at all.

10:27:50AM 21 THE COURT: If a bond is required by the court,  
10:27:53AM 22 what should it be?

10:27:55AM 23 MR. BLEIMAN: We don't believe a bond should be  
10:27:59AM 24 necessary here, given the wholesale misconduct,  
10:28:04AM 25 concealment, and nondisclosure that the defendants have

10:28:07AM 1 engaged in. Again, I don't believe they have sold very  
10:28:14AM 2 many units, to begin with, in their -- since they have  
10:28:19AM 3 launched these products. So I would say a very small  
10:28:23AM 4 bond, because they really haven't sold many of their own  
10:28:29AM 5 products anyway that would require that significant of a  
10:28:41AM 6 bond.

10:28:41AM 7 THE COURT: You will have a chance to come back.  
10:28:44AM 8 I want to hear from Mr. Whitaker.

10:28:50AM 9 MR. WHITAKER: Just for scheduling, your Honor,  
10:28:52AM 10 do you want me to respond to that and then discuss our  
10:28:54AM 11 TRO, which will take --

10:28:55AM 12 THE COURT: We will take up this first and then  
10:28:57AM 13 your TRO.

10:28:59AM 14 MR. WHITAKER: Candidly, this is really about  
10:29:01AM 15 trying to stifle legitimate competition. That's the real  
10:29:05AM 16 issue. There is no question -- There are several  
10:29:07AM 17 different claims, or at least wrongful actions, that are  
10:29:10AM 18 alleged against Mr. Sykes.

10:29:12AM 19 Mr. Bleiman said at the first TRO there were a lot of  
10:29:16AM 20 allegations -- promises made that Mr. Sykes didn't do  
10:29:19AM 21 whatever he was alleged to be doing. That's true. That's  
10:29:23AM 22 because this key generator was not a part of the first  
10:29:26AM 23 TRO. The only thing they asked for was to stop his entire  
10:29:30AM 24 business, because the allegations then were, as they still  
10:29:32AM 25 are --

10:29:33AM 1 THE COURT: Let's talk about the key generator  
10:29:35AM 2 alone for a moment.

10:29:36AM 3 MR. WHITAKER: Certainly, your Honor. The key  
10:29:38AM 4 generator was provided to Mr. Sykes-Bonnett, it is true.  
10:29:42AM 5 Ken Cannata was then an owner. He had information -- He  
10:29:47AM 6 and Kevin Sykes-Bonnett, as we have mentioned in the  
10:29:50AM 7 moving papers, worked together, because HP Tuners was  
10:29:54AM 8 seeking to acquire from him, Kevin Sykes-Bonnett,  
10:29:59AM 9 directly, a lot of information about certain vehicles,  
10:30:02AM 10 Dodge vehicles, because HP Tuners wanted to acquire  
10:30:06AM 11 information about Dodge vehicles. Also Ford vehicles.  
10:30:10AM 12 The moving papers are pretty clear that HP Tuners was  
10:30:13AM 13 seeking Mr. Sykes-Bonnett out to acquire confidential  
10:30:19AM 14 information from him that they could then incorporate into  
10:30:22AM 15 their product. It is ironic they are now accusing him of  
10:30:27AM 16 taking their stuff.

10:30:28AM 17 THE COURT: Well, are you indicating this was an  
10:30:30AM 18 authorized --

10:30:31AM 19 MR. WHITAKER: Yes.

10:30:32AM 20 THE COURT: -- transfer of this key generator?

10:30:35AM 21 MR. WHITAKER: That is my understanding of the  
10:30:37AM 22 current -- Yes. Mr. Cannata --

10:30:41AM 23 THE COURT: Where in Mr. Cannata's declaration  
10:30:44AM 24 does it indicate this was permitted by HP Tuners?

10:30:47AM 25 MR. WHITAKER: In the declaration he states that

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10:30:49AM 1 he gave it to him to appease him for -- That he was  
10:30:53AM 2 authorized by HP Tuners, your Honor?

10:30:55AM 3 THE COURT: Yes.

10:30:56AM 4 MR. WHITAKER: As a co-owner, I would just -- I  
10:30:58AM 5 guess the implication is that as a co-owner he owns the  
10:31:01AM 6 rights on equal footing as the others, and so he would do  
10:31:04AM 7 with it what he will, with the understanding that was sort  
10:31:07AM 8 of the common practice, this sharing confidential  
10:31:10AM 9 information.

10:31:10AM 10 THE COURT: You are saying the record  
10:31:12AM 11 demonstrates implied authority?

10:31:13AM 12 MR. WHITAKER: Yes, your Honor. Certainly  
10:31:15AM 13 implied authority, if nothing else, with the understanding  
10:31:21AM 14 that it would not be used outside of the limited use for  
10:31:25AM 15 which these people were exchanging confidential  
10:31:29AM 16 information.

10:31:30AM 17 THE COURT: And has it been?

10:31:32AM 18 MR. WHITAKER: I believe Mr. Kevin Sykes-Bonnett  
10:31:37AM 19 would, under oath, have to testify he used it outside the  
10:31:40AM 20 purview that Mr. Cannata gave it to him.

10:31:44AM 21 THE COURT: Why shouldn't it be returned?

10:31:46AM 22 MR. WHITAKER: It should be, your Honor. We have  
10:31:47AM 23 no objection. The key generator, however, is one  
10:31:49AM 24 allegation of wrongdoing. Here is a thing that HP Tuners  
10:31:53AM 25 has that is worth some money. I would like to discuss



1 irreparable harm, but it is worth some money.

2 Mr. Sykes-Bonnett should not have it. That is undeniable.

3 He is perfectly willing to -- I don't know about return

4 it, but destroy it, cease to use it, make no further use.

5 He has made no use of it in quite some time. It was a

6 very brief window of time.

7 As to the allegations --

8 THE COURT: What about the flash drive?

9 MR. WHITAKER: It is part and parcel. It is

10 software that is stored on the flash drive. It is a

11 little unclear to me whether the flash drive can be

12 returned. Certainly willing to never use it again, if it

13 is even usable. That's a little up in the air at the

14 moment. But certainly something we need to dig into.

15 THE COURT: You don't know whether the flash

16 drive exists?

17 MR. WHITAKER: Currently I do not, your Honor.

18 THE COURT: Or whether its contents have been

19 transferred to another computer?

20 MR. WHITAKER: I am of the understanding that the

21 contents do not exist anywhere except on that flash drive.

22 If that flash drive continues to exist is the only --

23 THE COURT: You're conceding that HP is entitled

24 to an order directing that Sykes-Bonnett cease using the

25 key generator tool, and return it if it exists in any

10:33:16AM 1 form, and similarly with respect to the flash drive?

10:33:21AM 2 MR. WHITAKER: Yes, your Honor.

10:33:22AM 3 THE COURT: Let's go to the software.

10:33:25AM 4 MR. WHITAKER: And that's a critical distinction,  
10:33:27AM 5 your Honor. It is true HP Tuners sells a product, and  
10:33:31AM 6 they make money, a lot of money, and have for many, many  
10:33:33AM 7 years by selling these key generators. As we discussed  
10:33:37AM 8 last time, that is a completely separate issue from  
10:33:40AM 9 whether Syked Tuning software includes anything from HP  
10:33:44AM 10 Tuners.

10:33:44AM 11 It is, A, completely separate, and demonstrably  
10:33:47AM 12 untrue, because Syked Tuning's software has been in  
10:33:52AM 13 existence for years, several years before these  
10:33:54AM 14 allegations came up.

10:33:55AM 15 And, critically -- why it is so critically important  
10:33:58AM 16 here is, for ten months, since the last time we were all  
10:34:01AM 17 here, there has been a standing offer to take Syked Tuning  
10:34:04AM 18 software, the software he uses to feed his family and make  
10:34:08AM 19 money, and compare it -- hand it to an independent third  
10:34:11AM 20 party --

10:34:12AM 21 THE COURT: Who might that be?

10:34:14AM 22 MR. WHITAKER: What we would like to do is have  
10:34:16AM 23 perhaps two or three recommended experts on their side,  
10:34:18AM 24 two or three on our side, and pick from among them, some  
10:34:22AM 25 sort of mutual agreement of who that independent third

10:34:25AM 1 party would be.

10:34:27AM 2 THE COURT: Essentially, you would be seeking an  
10:34:31AM 3 expert -- He hasn't agreed to it. So you are seeking one  
10:34:35AM 4 from the court under 706?

10:34:39AM 5 MR. WHITAKER: Yes, your Honor.

10:34:41AM 6 THE COURT: And the parties would share the  
10:34:42AM 7 expense?

10:34:43AM 8 MR. WHITAKER: Yes. Yes. We believe that will  
10:34:47AM 9 put to rest this issue. We have been pushing hard for  
10:34:50AM 10 that for many, many months. HP Tuners has resisted.

10:34:53AM 11 THE COURT: Are there experts out there that can  
10:34:55AM 12 do this?

10:34:56AM 13 MR. WHITAKER: Easy enough. Yes, your Honor. It  
10:34:58AM 14 is a relatively straightforward process. You just take  
10:35:01AM 15 source code on one side, source code on the other --

10:35:03AM 16 THE COURT: I think I appreciate that. It is  
10:35:07AM 17 sort of unique to this industry?

10:35:09AM 18 MR. WHITAKER: I do not believe that is the case,  
10:35:11AM 19 your Honor. I believe it's pretty much a straightforward  
10:35:14AM 20 software comparison. And we would invite that. Still do.  
10:35:18AM 21 We believe that would completely eliminate the vast  
10:35:21AM 22 majority of the moneymaking issue here.

10:35:23AM 23 The real issue is HP Tuners understands now -- has an  
10:35:28AM 24 appreciation that Kevin Sykes-Bonnett did something bad.  
10:35:34AM 25 He is remorseful for having done that.

10:35:37AM 1 But in the grand scheme of things, that's actually a  
10:35:41AM 2 fairly minor thing, what he did. HP Tuners has admitted  
10:35:43AM 3 this may have been going on for years, yet they have no  
10:35:47AM 4 appreciable, no noticeable, no identifiable impact on  
10:35:50AM 5 their finances. They can identify no money.

10:35:53AM 6 Kevin Sykes-Bonnett will testify, to the extent he  
10:35:55AM 7 may have received any money, it is very, very paltry in  
10:35:59AM 8 comparison to the hundreds of millions of dollars that  
10:36:01AM 9 they are alleging.

10:36:03AM 10 That's a relatively minor issue compared to shutting  
10:36:07AM 11 down the sale of every dollar that flows into the company  
10:36:12AM 12 when -- addressing the irreparable harm issue -- for the  
10:36:15AM 13 last ten months we could have disposed of that entire  
10:36:19AM 14 issue easily. There has been a standing issue -- a  
10:36:21AM 15 standing offer to do so, and it has been refused, been  
10:36:24AM 16 rejected flatly.

10:36:25AM 17 So to the extent that any order should be fashioned,  
10:36:30AM 18 we believe that it should -- just based on the simple  
10:36:35AM 19 notions of equity, he should be able to continue doing  
10:36:38AM 20 what he's doing in the absence of any demonstration or  
10:36:41AM 21 effort by HP Tuners' part to prove that he is -- you know,  
10:36:45AM 22 he did anything wrong before now. It hasn't happened, and  
10:36:48AM 23 it simply doesn't exist.

10:36:50AM 24 As to the cable, it is the same thing. Ken Cannata  
10:36:56AM 25 is apparently a former owner and lead engineer at HP

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10:37:01AM 1 Tuners, left, and is developing -- helped develop another  
10:37:08AM 2 cable, which Syked ECU Tuning is selling. They have now  
10:37:13AM 3 developed it. Ken Cannata, obviously, is the person who  
10:37:16AM 4 developed it at HP Tuners. There is a lot of sort of just  
10:37:20AM 5 knowledge -- engineering knowledge in his head. But he  
10:37:24AM 6 has to earn a living. He can't unlearn what he learned.

10:37:29AM 7 THE COURT: That doesn't authorize him to take  
10:37:32AM 8 intellectual property, trade secrets, what we are talking  
10:37:35AM 9 about, essentially, here, and go to a competitor and use  
10:37:38AM 10 that obtained trade secret.

10:37:41AM 11 MR. WHITAKER: That is exactly true, your Honor.  
10:37:43AM 12 There are many, many things that are totally absent from  
10:37:47AM 13 plaintiff's TRO. For example, in order to have trade  
10:37:50AM 14 secret misappropriation, the first thing you have to have  
10:37:53AM 15 is a trade secret. They have simply assumed away what in  
10:37:57AM 16 a trade secrets case is the bulk of the argument. They  
10:38:00AM 17 have to prove what they developed, how they kept it  
10:38:02AM 18 secret, how it is not simply industry standard  
10:38:05AM 19 communication --

10:38:06AM 20 THE COURT: You are contending that there is no  
10:38:08AM 21 trade secrets contained in the design of the cable?

10:38:11AM 22 MR. WHITAKER: Yes, your Honor. That is,  
10:38:14AM 23 indeed -- Again, while this cable is brand new --

10:38:18AM 24 THE COURT: How would Sykes have developed the  
10:38:21AM 25 cable but for Cannata's knowledge he gained from HP?

10:38:27AM 1 MR. WHITAKER: Well, knowledge gained is not  
10:38:29AM 2 necessarily a trade secret. That is simply the experience  
10:38:33AM 3 of an engineer. Plus, they have incorporated other  
10:38:37AM 4 engineers to work on this product. Without using HP  
10:38:41AM 5 Tuners -- whatever they have that may be proprietary, it  
10:38:46AM 6 is perfectly -- Mr. Cannata, for example, he designed the  
10:38:49AM 7 first HP Tuners cable, he could just as easily design  
10:38:53AM 8 another one.

10:38:55AM 9 THE COURT: The cable doesn't fit in the same  
10:38:57AM 10 category as the flash drive and the key generator tool?

10:39:01AM 11 MR. WHITAKER: No, your Honor. The so-called  
10:39:03AM 12 eliminator cable does not. The Syked Tuning product does  
10:39:07AM 13 not.

10:39:08AM 14 There is a request that HP Tuners (sic) return  
10:39:11AM 15 something called a -- I think it is called an E38 wiring  
10:39:14AM 16 harness. It is literally just wire, effectively. There  
10:39:18AM 17 was a picture of it posted to Facebook. They claim that  
10:39:21AM 18 it is their proprietary design. I think we have submitted  
10:39:24AM 19 evidence, well, no, Speartech is selling it. Anybody  
10:39:28AM 20 who's got 200 bucks in their pocket can buy it off the  
10:39:32AM 21 shelf. Again, to that first issue, first you have to  
10:39:35AM 22 prove that is a trade secret. If I can go buy it from  
10:39:38AM 23 another competitor, the exact same product, off the  
10:39:40AM 24 shelf --

10:39:40AM 25 THE COURT: So you are not conceding the cable?

10:39:43AM 1 MR. WHITAKER: Exactly right, your Honor.

10:39:46AM 2 In a nutshell, that's where we are on this claim. We  
10:39:49AM 3 think the likelihood of success on the merits is weak. It  
10:39:55AM 4 is nonexistent on the software. We are no closer -- in  
10:39:58AM 5 fact, we are further now away from any likelihood of any  
10:40:03AM 6 success on the software.

10:40:04AM 7 As to the cloned cables, it is true, again,  
10:40:08AM 8 Mr. Sykes-Bonnett has never denied, that he did acquire a  
10:40:13AM 9 clone cable at some time in the past and tried to sell it  
10:40:16AM 10 on Facebook or something. That was one cable. He didn't  
10:40:18AM 11 sell it. He destroyed it and sent it back.

10:40:22AM 12 HP Tuners is here alleging that Mr. Sykes-Bonnett is  
10:40:25AM 13 doing that, is behind that, is selling it. Untrue. HP  
10:40:29AM 14 Tuners knows it is untrue, because HP Tuners knows who is  
10:40:32AM 15 doing it.

10:40:32AM 16 There is a Russian individual named Vladimir  
10:40:37AM 17 something or other in New York who all indications point  
10:40:41AM 18 to as being the source of all of these cloned cables. As  
10:40:45AM 19 soon as they noticed that, they served discovery on us  
10:40:47AM 20 asking for communications with that person, because they  
10:40:50AM 21 know that's the guy doing it.

10:40:51AM 22 THE COURT: Are you conceding the cloned cable in  
10:40:54AM 23 this --

10:40:55AM 24 MR. WHITAKER: We are flatly denying that  
10:40:57AM 25 Mr. Sykes-Bonnett is the source of any cloned cable. He

10:41:00AM 1 did buy one from --

10:41:02AM 2 THE COURT: So it could be included in the  
10:41:04AM 3 restraining order, that he will not use in any way or  
10:41:08AM 4 possess this cloned cable?

10:41:12AM 5 MR. WHITAKER: Certainly. He is ready to return  
10:41:16AM 6 it to HP Tuners. But, yes.

10:41:22AM 7 THE COURT: That's all I am asking.

10:41:24AM 8 MR. WHITAKER: Yes, that's exactly true.

10:41:25AM 9 There was some discussion about initial disclosures.  
10:41:27AM 10 We named Ken Cannata. I don't know if you need any  
10:41:31AM 11 response on that.

10:41:33AM 12 THE COURT: You can give a short response,  
10:41:38AM 13 because he is contending this is part of a pattern of  
10:41:41AM 14 concealment, and that you, in fact, had Cannata's contact  
10:41:44AM 15 information, but made a different statement in your  
10:41:49AM 16 disclosures.

10:41:53AM 17 MR. WHITAKER: In the initial disclosures filed  
10:41:55AM 18 at the very beginning we identified Mr. Cannata. We  
10:41:57AM 19 assumed they had contact information that was at least as  
10:42:01AM 20 good as ours, because he was a former owner.

10:42:05AM 21 I will admit when those documents were prepared the  
10:42:09AM 22 import of Mr. Cannata as a witness separate and apart from  
10:42:12AM 23 everybody else was unknown. But we disclosed him.

10:42:15AM 24 As to Bobbie Cannata, she was not somebody who we  
10:42:17AM 25 believed had any knowledge that was relevant to anything.

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10:42:21AM 1 She was a silent partner.

10:42:22AM 2 THE COURT: I think you have answered. I would  
10:42:23AM 3 just say be careful when you are making disclosures. Be  
10:42:27AM 4 sure that it is accurate, when clearly you had contact  
10:42:32AM 5 information. Somebody within the party you represented  
10:42:34AM 6 certainly knew that.

10:42:35AM 7 MR. WHITAKER: Yes, your Honor. That's  
10:42:39AM 8 realistically it. Again, to the extent any -- This has  
10:42:44AM 9 been going on for a long time. There has been no  
10:42:46AM 10 demonstration or evidence that HP Tuners has suffered any  
10:42:50AM 11 irreparable harm or will in any fashion at all.

10:42:56AM 12 THE COURT: All right. Do you agree a  
10:43:00AM 13 preliminary injunction hearing can be set out ten weeks or  
10:43:06AM 14 so?

10:43:06AM 15 MR. WHITAKER: Fair enough, your Honor. There is  
10:43:08AM 16 the issue of the current schedule, I believe, we would  
10:43:10AM 17 have to take up and revisit. Discovery -- the close of  
10:43:13AM 18 discovery is relatively imminent. And expert reports are  
10:43:17AM 19 behind us.

10:43:18AM 20 THE COURT: That's the other thing, can we  
10:43:21AM 21 accelerate the entire schedule and have a trial on this  
10:43:24AM 22 matter rather than duplicate and have additional expenses  
10:43:27AM 23 for a preliminary injunction?

10:43:31AM 24 MR. WHITAKER: Perhaps. I haven't mentioned that  
10:43:37AM 25 option to the client. I am certainly in favor of it. I

10:43:42AM 1 would like resolution quickly.

10:43:43AM 2 THE COURT: If we are going to get ready for a  
10:43:46AM 3 preliminary injunction, my experience is that the  
10:43:49AM 4 preliminary injunction is pretty thorough in determining  
10:43:54AM 5 factual issues. The ultimate outcome is going to likely  
10:44:07AM 6 abide the preliminary injunction ruling.

10:44:10AM 7 MR. WHITAKER: Agreed, your Honor. That's really  
10:44:13AM 8 all I have. If you have more questions, I am happy to  
10:44:15AM 9 answer them.

10:44:15AM 10 THE COURT: Not at this time. We will go back.

10:44:17AM 11 MR. WHITAKER: Should we resolve this one and  
10:44:20AM 12 then --

10:44:21AM 13 THE COURT: Yes. Mr. Bleiman. We have a  
10:44:28AM 14 conceded motion with respect to the key generator tool,  
10:44:35AM 15 the flash drive, and the cloned cable. You can have your  
10:44:41AM 16 order on that.

10:44:42AM 17 What I am going to ask you to do, though, is have a  
10:44:46AM 18 new proposed order with respect to that. We will go over  
10:44:50AM 19 these other issues, and there may be more to be added.  
10:45:02AM 20 Submit that as an agreed order. That's the way I view it  
10:45:06AM 21 at this point. And that can be submitted by a week from  
10:45:12AM 22 today. So let's confine to the software.

10:45:18AM 23 MR. BLEIMAN: Correct. Your Honor, we disagree  
10:45:23AM 24 with Mr. Whitaker's representations. There is millions of  
10:45:27AM 25 lines of code here that we are talking about. This would

10:45:30AM 1 require someone with specific knowledge in this industry.  
10:45:36AM 2 We don't believe there is really anyone that could do it,  
10:45:41AM 3 and do it for --

10:45:42AM 4 THE COURT: That strikes me as logical. I am  
10:45:44AM 5 certainly no software expert myself, but it seems to me  
10:45:51AM 6 just being a software expert doesn't enable you to  
10:45:54AM 7 understand the industry. Are there such people that can  
10:45:58AM 8 be appointed?

10:46:00AM 9 MR. BLEIMAN: We don't believe so. I think we  
10:46:03AM 10 have addressed that in our papers, as well, the challenges  
10:46:07AM 11 there. It would be someone that would be in the industry,  
10:46:09AM 12 likely a competitor. I can say we don't want a competitor  
10:46:14AM 13 having our code, and I would venture a guess that they  
10:46:18AM 14 wouldn't either. Although, again, we believe they --

10:46:22AM 15 THE COURT: Ultimately is this going to have to  
10:46:24AM 16 come down to experts?

10:46:26AM 17 MR. BLEIMAN: Well, your Honor --

10:46:27AM 18 THE COURT: Other than the parties themselves are  
10:46:32AM 19 internal experts. But I mean retained experts. Isn't the  
10:46:37AM 20 court going to have to hear from retained experts to  
10:46:40AM 21 resolve a dispute between internal experts?

10:46:43AM 22 MR. BLEIMAN: Yes, on certain parts of this. For  
10:46:45AM 23 example, the parameters list -- We addressed this in the  
10:46:48AM 24 first TRO, and we have referenced it here. The parameters  
10:46:54AM 25 list is a couple of thousand lines that relate to

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10:47:00AM 1 different features of the car. There is a description  
10:47:04AM 2 from the manufacturer that is in some manufacturer  
10:47:16AM 3 verbiage that really doesn't make sense.

10:47:19AM 4 Ten-plus years ago Mr. Prociuk wrote for one  
10:47:25AM 5 particular manufacturer description, he called it the max  
10:47:30AM 6 torque value. He just came up with that name. He did  
10:47:36AM 7 this for thousands of different manufacturer names.

10:47:41AM 8 In just what we have seen, Mr. Sykes-Bonnett's  
10:47:44AM 9 parameter names are the same. He put this on Facebook.  
10:47:49AM 10 It says max torque value for that same manufacturer name.

10:47:56AM 11 Now, this is something that came out of his brain ten  
10:47:58AM 12 years ago. It is just what he abbreviatedly called it.  
10:48:03AM 13 And it is duplicated --

10:48:03AM 14 THE COURT: It might be in the public domain,  
10:48:07AM 15 might it not?

10:48:08AM 16 MR. BLEIMAN: No. This is part of our code.  
10:48:10AM 17 This is part of our software. He would not know what we  
10:48:13AM 18 named it unless he has it. We now know he does have it.  
10:48:18AM 19 That's one example.

10:48:21AM 20 And then the licensing screen that we showed, it is  
10:48:24AM 21 an exact duplicate of our licensing screen. They say,  
10:48:27AM 22 "Oh, that's just general." The verbiage is exactly the  
10:48:30AM 23 same.

10:48:30AM 24 There is a picture that he posted on Facebook. It  
10:48:34AM 25 says, "PCM tools confidential." It is our confidential

10:48:38AM 1 software. So he has these things. We believe he used it  
10:48:42AM 2 as a reference.

10:48:44AM 3 Again, I made the comment earlier that it has allowed  
10:48:50AM 4 him to implement algorithms to support a number of  
10:48:54AM 5 different vehicles that he hadn't previously supported,  
10:48:58AM 6 because he had our code and was able to see how we were  
10:49:00AM 7 doing it, and so he could quickly bring those on.

10:49:04AM 8 So while it may not be an exact duplicate -- And who  
10:49:09AM 9 knows what he has done to change it since the outset.  
10:49:13AM 10 There has been incorporation, there has been reference,  
10:49:16AM 11 there has been use, there has been reliance on our code to  
10:49:20AM 12 develop his software.

10:49:22AM 13 In addition, in discovery -- And I'm glad we briefly  
10:49:27AM 14 brought up the discovery schedule, because we also filed a  
10:49:30AM 15 motion to compel, and for sanctions, and to amend the  
10:49:35AM 16 schedule based on all these discovery abuses that I  
10:49:38AM 17 outlined.

10:49:40AM 18 But Mr. Whitaker made the comment, "This has been  
10:49:43AM 19 going on a long time." Well, we haven't gotten any  
10:49:46AM 20 documents or information. They have concealed it all.  
10:49:50AM 21 They have withheld it all. We need to see this stuff.

10:49:53AM 22 For example, we asked for a beta version of their  
10:49:55AM 23 software, dated April 7th, in discovery. That was  
10:49:58AM 24 supposed to be produced months and months ago. We still  
10:50:01AM 25 don't have it. That is what he showed on the screen that

10:50:06AM 1 duplicated our parameters names in that picture he put on  
10:50:11AM 2 Facebook of that screen, where we got wind that he had our  
10:50:16AM 3 name somehow.

10:50:21AM 4 There is quite a bit of discovery. They haven't  
10:50:24AM 5 produced a lot of the information and documents that we  
10:50:29AM 6 have asked for.

10:50:30AM 7 As it relates to the restraining order, though, that  
10:50:33AM 8 we are talking about today, the harness issue, we  
10:50:38AM 9 disagree. That's a proprietary harness that Mr. Prociuk  
10:50:42AM 10 developed. The harness they show -- and we put this in  
10:50:46AM 11 our declaration and our reply -- is a different harness.

10:50:50AM 12 Speartech does sell a harness publicly, but not our  
10:50:54AM 13 harness. We have a proprietary harness that is different  
10:50:57AM 14 from what's publicly offered that they have. They have it  
10:51:01AM 15 because Mr. Cannata gave it to them. And they shouldn't  
10:51:03AM 16 have it. They developed their product using our harness.

10:51:15AM 17 And there is pictures, again, on Facebook, that  
10:51:19AM 18 Mr. Sykes-Bonnett posted, showing our harness on his desk.  
10:51:27AM 19 That's ours. This. I am pointing to one of the exhibits.

10:51:31AM 20 THE COURT: Of course, I can't see it. But I  
10:51:34AM 21 realize it is in the record.

10:51:38AM 22 I think I have heard enough. I do want to come back  
10:51:41AM 23 briefly here to Mr. Whitaker and ask about the harness.  
10:51:46AM 24 Where are we on the harness?

10:51:49AM 25 MR. WHITAKER: May I briefly respond?

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10:51:51AM 1 THE COURT: Very briefly.

10:51:52AM 2 MR. WHITAKER: Very briefly. All of that  
10:51:55AM 3 pertains to what I said earlier, what is a trade secret.  
10:51:58AM 4 The fact that this information was visible on Facebook,  
10:52:00AM 5 just like it would be from HP Tuners if somebody put up a  
10:52:04AM 6 screenshot of a picture of HP Tuners' on Facebook, makes  
10:52:07AM 7 it clearly what the judge -- what the court has said,  
10:52:10AM 8 public domain. It is not a trade secret. You have to  
10:52:13AM 9 keep it a secret in order for it to be a secret. If it is  
10:52:17AM 10 visible on Facebook, it is not a trade secret. That's  
10:52:20AM 11 realistically all I want to say. Other than the document  
10:52:22AM 12 production is a major --

10:52:23AM 13 THE COURT: Are you using this wiring harness,  
10:52:26AM 14 this A38?

10:52:30AM 15 MR. WHITAKER: I believe it has been used in the  
10:52:32AM 16 past.

10:52:34AM 17 THE COURT: Do you intend to use it in the  
10:52:36AM 18 future?

10:52:36AM 19 MR. WHITAKER: You could use it, or you could  
10:52:38AM 20 just use one of the exact same things you can buy from  
10:52:42AM 21 Speartech. It may look different, but, back to the  
10:52:45AM 22 trade-secret issue, they are functionally identical.  
10:52:48AM 23 There is nothing proprietary about it. It is just wires  
10:52:51AM 24 wired up a certain way. There is nothing proprietary at  
10:52:55AM 25 all.

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10:52:55AM 1 THE COURT: So you are telling me it is disputed?

10:52:58AM 2 MR. WHITAKER: Disputed. Yes, your Honor. Is  
10:53:02AM 3 that it?

10:53:03AM 4 THE COURT: That's it on the plaintiff's motion  
10:53:06AM 5 for temporary restraining order. I guess you can resume  
10:53:09AM 6 the podium, if that's where you prefer to address the  
10:53:12AM 7 court on your motion.

10:53:13AM 8 MR. BLEIMAN: Your Honor, may I ask a question?

10:53:15AM 9 THE COURT: Yes.

10:53:16AM 10 MR. BLEIMAN: Because there are some other things  
10:53:18AM 11 we have asked for in the TRO, like an order preventing  
10:53:23AM 12 them from releasing our source code, open sourcing our  
10:53:28AM 13 source code. We don't, candidly, trust that we are going  
10:53:33AM 14 to get back everything that he has, or that he doesn't  
10:53:36AM 15 have copies of it, in light of everything that has gone  
10:53:40AM 16 on. So we would like restrictions that prevent him from  
10:53:44AM 17 releasing our software publicly, or open sourcing our  
10:53:48AM 18 software, or releasing our code.

10:53:52AM 19 THE COURT: The contention, as I understand it,  
10:53:55AM 20 is the source code is not in their software.

10:54:01AM 21 MR. BLEIMAN: No, but they have the flash drive  
10:54:05AM 22 with our source code on it.

10:54:07AM 23 THE COURT: I see. You are just asking about  
10:54:10AM 24 elaboration of that which the court is going to grant with  
10:54:14AM 25 respect to the flash drive and the key generator tool.



10:54:19AM 1 You are saying it should also preclude further disclosure.  
10:54:24AM 2 I think that's all -- or dissemination. That's what you  
10:54:28AM 3 are seeking, and I think, essentially, that's agreed to.

10:54:30AM 4 MR. BLEIMAN: Yeah. I mean, there is a bunch of  
10:54:31AM 5 additional --

10:54:32AM 6 THE COURT: That is essentially agreed to.

10:54:35AM 7 MR. BLEIMAN: We will try to work together to  
10:54:37AM 8 fashion the relief.

10:54:38AM 9 THE COURT: That's what I am asking. I think you  
10:54:40AM 10 need to be satisfied that it is thorough enough to fulfill  
10:54:42AM 11 the purpose. I don't want to sit here and try and craft  
10:54:48AM 12 all the particular language. I am going to ask  
10:54:51AM 13 Mr. Whitaker to work with you. I understand that Sykes is  
10:55:00AM 14 conceding these points, so it should be broad to protect  
10:55:07AM 15 those items.

10:55:10AM 16 MR. BLEIMAN: As far as the sale of the  
10:55:11AM 17 competitive products or the turn-over of a cable so we can  
10:55:15AM 18 have it examined, try to work together on that? Are you  
10:55:22AM 19 ruling on that?

10:55:23AM 20 THE COURT: Are we talking about the cloned  
10:55:26AM 21 cable?

10:55:26AM 22 MR. BLEIMAN: No. We are talking about the Syked  
10:55:29AM 23 eliminator cable.

10:55:30AM 24 THE COURT: The eliminator cable?

10:55:39AM 25 MR. BLEIMAN: Right.

10:55:40AM 1 THE COURT: You want one of theirs for what  
10:55:44AM 2 purpose?

10:55:45AM 3 MR. BLEIMAN: To forensically examine it so that  
10:55:48AM 4 we can demonstrate that it is a duplicate of our cable.

10:55:49AM 5 THE COURT: That seems like a discovery issue.  
10:55:51AM 6 Is there any problem with that?

10:55:53AM 7 MR. WHITAKER: No, your Honor, with the  
10:55:54AM 8 understanding that normal discovery rules apply.

10:55:57AM 9 THE COURT: Right. There will be a protective  
10:56:01AM 10 order and so forth. You should be able to work that out.

10:56:04AM 11 MR. BLEIMAN: As far as him, Mr. Sykes, being  
10:56:19AM 12 able to continue selling the software and the cable  
10:56:23AM 13 publicly pending the hearing on preliminary injunction, is  
10:56:27AM 14 that something you are going to rule on?

10:56:29AM 15 THE COURT: I am going to rule on that. We can  
10:56:32AM 16 take it up right now. I don't know that we have made  
10:56:36AM 17 enough progress here from where we were ten months ago.  
10:56:45AM 18 The big problem is likelihood to prevail on the merits.  
10:56:48AM 19 There are lots of contested issues here. The court can't  
10:56:51AM 20 make a factual finding at this point that either party is  
10:56:54AM 21 likely to succeed. The assertions in some cases are just  
10:56:59AM 22 poles apart.

10:57:01AM 23 And furthermore, the hardships, I think, in this  
10:57:04AM 24 case, weigh in favor of the defendant. Just how much his  
10:57:12AM 25 business might be destroyed is difficult to evaluate. But

10:57:16AM 1 I don't think that there has been really a dispute that it  
10:57:24AM 2 would, if not destroy his business substantially for the  
10:57:27AM 3 period of this litigation, impair his ability to make the  
10:57:31AM 4 business -- And it may cause it to fail. And so the  
10:57:35AM 5 other elements are neutral with regard to public interest,  
10:57:39AM 6 and so forth.

10:57:41AM 7 I am going to deny it with respect to the software.  
10:57:46AM 8 And then we will talk about a preliminary injunction  
10:57:49AM 9 hearing. I will come back to that and we will talk about  
10:57:55AM 10 that.

10:57:56AM 11 I also want to talk about an expert, the appointment  
10:58:02AM 12 of an expert, that is authorized under the Federal Rules  
10:58:07AM 13 of Evidence to assist the court here. But I am open on  
10:58:11AM 14 that. As I said, we will talk about that further.

10:58:14AM 15 I wanted to take up the defendant's motion here.

10:58:18AM 16 MR. WHITAKER: Very briefly, your Honor, I think  
10:58:23AM 17 the motion sort of speaks for itself. We were shocked and  
10:58:26AM 18 floored last week when we saw all this information  
10:58:30AM 19 produced by the plaintiff that revealed that someone  
10:58:35AM 20 professing to be an anonymous hacker had access to  
10:58:39AM 21 someone's email. It is currently unclear whether it was  
10:58:42AM 22 Mr. Kevin Sykes-Bonnett's email or someone else's email,  
10:58:44AM 23 perhaps Ken Cannata's, but was pillaging through lots of  
10:58:48AM 24 very confidential information.

10:58:49AM 25 THE COURT: Is this illegal conduct?

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10:58:51AM 1 MR. WHITAKER: Yes, it is, your Honor.

10:58:52AM 2 THE COURT: Is it criminal conduct?

10:58:54AM 3 MR. WHITAKER: I believe that it is. Some of the  
10:58:55AM 4 conduct is. There is reference -- We have not briefed  
10:59:00AM 5 it, but there is reference to recordings of  
10:59:01AM 6 Mr. Sykes-Bonnett's voice, which would have been a  
10:59:04AM 7 violation of the Wiretap Act, clearly. As the court is  
10:59:09AM 8 aware, it is two-party consent in this court --

10:59:13AM 9 THE COURT: In this state.

10:59:14AM 10 MR. WHITAKER: In this state, yes. None of this  
10:59:17AM 11 was authorized, certainly. There are some ideas about who  
10:59:21AM 12 perhaps did it. Those ideas sort of fuel the notion of  
10:59:26AM 13 why that person or the person professing to be anonymous  
10:59:30AM 14 would like to be -- would like some immunity from  
10:59:33AM 15 prosecution by HP Tuners, or whoever, perhaps the  
10:59:37AM 16 government. It is unclear.

10:59:39AM 17 THE COURT: I don't have enough information to  
10:59:42AM 18 draw any conclusions, of course. But on the face of it,  
10:59:46AM 19 it is clear that it could conceivably implicate criminal  
10:59:51AM 20 violations here.

10:59:53AM 21 MR. WHITAKER: Indeed, your Honor. Indeed it  
10:59:54AM 22 could, by multiple people. I think we have set out --  
10:59:57AM 23 it's cut and dried, a pretty obvious case, this is trade  
11:00:00AM 24 secrets, identified as such, that were acquired under  
11:00:03AM 25 circumstances which to any reasonable person --

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11:00:05AM 1 THE COURT: Trade secrets by itself could be a  
11:00:08AM 2 civil matter. But once somebody is hacking into a private  
11:00:12AM 3 email --

11:00:17AM 4 MR. WHITAKER: People do go to jail for that. I  
11:00:20AM 5 know one person who actually went to jail for hacking into  
11:00:23AM 6 an Xbox in violation of the Stored Communications Act.  
11:00:26AM 7 Yes, very serious conduct, we believe.

11:00:29AM 8 We believe that the evidence has shown --  
11:00:34AM 9 demonstrates pretty clearly, it's kind of a cut-and-dried  
11:00:36AM 10 case, there is a substantial likelihood on the merits in  
11:00:40AM 11 those.

11:00:41AM 12 We concede the weakness in this case. Since Thursday  
11:00:43AM 13 we have not added those claims to this case. We believe  
11:00:47AM 14 that motion is imminent. In fact, I would move now for  
11:00:50AM 15 leave to add claims in this case to include --

11:00:53AM 16 THE COURT: You need to file that. There needs  
11:00:58AM 17 to be supporting pleadings and an opportunity to oppose  
11:01:03AM 18 formally.

11:01:04AM 19 MR. WHITAKER: That is imminent, to that extent.

11:01:07AM 20 In terms of irreparable harm, much the way HP Tuners  
11:01:11AM 21 has said, Syked Tuning -- We don't know. We have no idea  
11:01:17AM 22 what they've got. We know there was apparently random  
11:01:19AM 23 access, unfettered access to somebody's email. We are not  
11:01:23AM 24 sure if it is Mr. Sykes-Bonnett's email.

11:01:27AM 25 There is a lot of stuff in there that is clearly

11:01:29AM 1 confidential. We don't know what they have. They haven't  
11:01:32AM 2 given us some sort of clear accounting under oath that we  
11:01:34AM 3 can attest to, that we know what they've got.

11:01:39AM 4 What we are asking for is all of the above.  
11:01:41AM 5 Essentially, pretty direct, simple, common-sense relief,  
11:01:45AM 6 which is identify under oath in sworn testimony everything  
11:01:48AM 7 that was provided --

11:01:52AM 8 THE COURT: These are basically discovery issues  
11:01:54AM 9 more than a TRO, as far as I can tell.

11:01:57AM 10 MR. WHITAKER: Well, sort of.

11:02:00AM 11 THE COURT: I will come back to you. Let me hear  
11:02:05AM 12 from Mr. Bleiman. We will go through the relief that's  
11:02:10AM 13 requested. I think much of it is conceded here.  
11:02:13AM 14 Mr. Bleiman.

11:02:14AM 15 MR. BLEIMAN: This is attempted misdirection and  
11:02:20AM 16 exaggeration from what's really going on. First of all,  
11:02:24AM 17 this person never professed to be a hacker, nor do we have  
11:02:31AM 18 any information or understanding that this person is a  
11:02:34AM 19 hacker. They have never communicated to us they were a  
11:02:38AM 20 hacker.

11:02:40AM 21 THE COURT: They communicated to you they had  
11:02:42AM 22 email access?

11:02:44AM 23 MR. BLEIMAN: They said they had some emails.  
11:02:47AM 24 That's the way that I understood it, between Sykes and  
11:02:51AM 25 Cannata.

11:02:53AM 1 Now, we don't know how he got those emails, if he was  
11:02:56AM 2 copied on those emails, forwarded those emails. All we  
11:03:00AM 3 understood is that this person had engaged in TeamViewer  
11:03:07AM 4 sessions with Mr. Sykes-Bonnett.

11:03:10AM 5 Now, a TeamViewer session is a shared computer  
11:03:14AM 6 screen. I'm not sure if you are familiar with it.

11:03:16AM 7 THE COURT: No.

11:03:18AM 8 MR. BLEIMAN: It is a voluntary session.  
11:03:20AM 9 Somebody can't TeamView with another person and share  
11:03:23AM 10 their screen unless they do it together.

11:03:25AM 11 THE COURT: So you are suggesting that this  
11:03:27AM 12 anonymous person may have been TeamViewing with the two of  
11:03:30AM 13 them?

11:03:31AM 14 MR. BLEIMAN: Well, that's what they said in the  
11:03:33AM 15 emails. We have produced everything we have with this  
11:03:38AM 16 anonymous informant.

11:03:41AM 17 We never asked for any information of Sykes. We are  
11:03:45AM 18 not interested in Sykes' information. We have no use for  
11:03:49AM 19 it. Again, our contention here is they have stolen all of  
11:03:53AM 20 our stuff and incorporated it into their own. We never  
11:03:57AM 21 requested any of Sykes' information. It was never --

11:04:01AM 22 THE COURT: Let's go through the request. The  
11:04:03AM 23 request is to immediately segregate all documents and  
11:04:07AM 24 things provided by the anonymous person or hacker to  
11:04:12AM 25 anyone, including anyone affiliated with HPT.

11:04:16AM 1 MR. BLEIMAN: Again, as you stated, and I think I  
11:04:19AM 2 put in the papers, I believe this is a discovery issue.  
11:04:23AM 3 We have produced every document exchanged with the  
11:04:26AM 4 anonymous informant. There were three emails and some  
11:04:31AM 5 images. I am happy to forward the actual email to  
11:04:39AM 6 Mr. Whitaker so he has an electronic version.

11:04:43AM 7 THE COURT: All right. The answer is you have  
11:04:47AM 8 segregated it and you will provide it?

11:04:49AM 9 MR. BLEIMAN: We have provided it, but not the  
11:04:52AM 10 electronic copy.

11:04:54AM 11 THE COURT: The second is, "Immediately safeguard  
11:04:56AM 12 all documents and things provided by the anonymous  
11:05:01AM 13 person," and, "Treat all those documents as attorneys'  
11:05:10AM 14 eyes only."

11:05:11AM 15 MR. BLEIMAN: I disagree with that. Again, this  
11:05:13AM 16 isn't a TRO issue. This is a discovery issue. The  
11:05:16AM 17 documents that he emailed me about on the 17th that he had  
11:05:21AM 18 an issue with, we did immediately make them attorneys'  
11:05:27AM 19 eyes only. The client never accessed --

11:05:29AM 20 THE COURT: You basically concede that?

11:05:32AM 21 MR. BLEIMAN: Yes.

11:05:32AM 22 THE COURT: Again, from my point, this is a  
11:05:34AM 23 discovery matter. I am not talking about entering a  
11:05:37AM 24 restraining order. Your representation as an officer of  
11:05:42AM 25 the court on this discovery issue is sufficient, as far as



11:05:44AM 1 I am concerned.

11:05:45AM 2 MR. BLEIMAN: So we have done that. Again, I  
11:05:50AM 3 don't think every document is attorneys' eyes only that  
11:05:56AM 4 this informant provided to us. The information that he  
11:06:01AM 5 challenged -- I mean, we were provided with the images.  
11:06:04AM 6 We attached those to our renewed emergency motion for TRO.  
11:06:09AM 7 That's an image of the computer screen showing our stuff  
11:06:13AM 8 on his computer. That's not, I don't believe, attorneys'  
11:06:17AM 9 eyes only.

11:06:18AM 10 The two documents, the hardware design document and  
11:06:22AM 11 the binary files, that has been segregated as attorneys'  
11:06:27AM 12 eyes only.

11:06:28AM 13 THE COURT: All right. Mr. Whitaker, I believe  
11:06:31AM 14 that satisfies the request on that.

11:06:35AM 15 MR. WHITAKER: Largely, your Honor. My response  
11:06:39AM 16 would be, if he is willing to represent that we have been  
11:06:42AM 17 provided a copy of everything, we will, obviously,  
11:06:46AM 18 represent to the court we will accept that.

11:06:48AM 19 As to segregating and treating as AEO, there is a --  
11:06:53AM 20 it should be apparent that there is some concern about  
11:06:55AM 21 confidential information getting leaked out. If any of  
11:06:59AM 22 that information has been shared with anyone else, the  
11:07:04AM 23 protective order --

11:07:05AM 24 THE COURT: I will ask you to work out the  
11:07:07AM 25 attorneys'-eyes-only documents, and bring it to the

11:07:12AM 1 court's attention if you can't reach an agreement as to  
11:07:16AM 2 what would otherwise have been undiscoverable. I will let  
11:07:23AM 3 you work that out.

11:07:25AM 4 I am going to move on to 3, which is, "Identify, by  
11:07:28AM 5 name and position at HPT, each and every individual who  
11:07:31AM 6 has had access to or been provided a copy of any of the  
11:07:35AM 7 documents and things provided by the anonymous person and  
11:07:41AM 8 which of those documents and things were provided."  
11:07:45AM 9 That's a discovery matter. Again, can you comply with  
11:07:49AM 10 that request?

11:07:50AM 11 MR. BLEIMAN: In connection with discovery, sure.

11:07:53AM 12 THE COURT: Can there not be expedited discovery  
11:07:56AM 13 on this, because this doesn't seem to be too complicated a  
11:08:03AM 14 question?

11:08:07AM 15 MR. BLEIMAN: Your Honor, I will tell you right  
11:08:09AM 16 now, it is three individuals.

11:08:10AM 17 THE COURT: Good. You can provide that after the  
11:08:12AM 18 hearing today, the names and contact information.

11:08:17AM 19 Moving to 4, "Produce to Syked Tuning every document  
11:08:22AM 20 and thing, including all communication provided by, or to,  
11:08:25AM 21 or exchanged with the anonymous hacker." Again, this  
11:08:30AM 22 appears to be valid. I think you have already indicated  
11:08:35AM 23 that you would.

11:08:37AM 24 MR. BLEIMAN: We have. Except there is -- they  
11:08:40AM 25 don't have the electronic copies of the particular emails

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11:08:44AM 1 with attachments, which I can forward to Mr. Whitaker.  
11:08:51AM 2 They have the attachments, I think, or the reference to  
11:08:56AM 3 the attachments. There is only three or four emails that  
11:08:59AM 4 have attachments.

11:09:00AM 5 THE COURT: Again, that need not have a formal  
11:09:02AM 6 order. We have a transcript here of what is going to  
11:09:07AM 7 transpire. Yes?

11:09:07AM 8 MR. WHITAKER: The only question is, I would ask  
11:09:09AM 9 for confirmation that is ongoing -- in connection with the  
11:09:14AM 10 next number, there is an ongoing obligation -- Because  
11:09:16AM 11 while we know what --

11:09:17AM 12 THE COURT: No. 5?

11:09:18AM 13 MR. WHITAKER: No. 5, yes.

11:09:19AM 14 THE COURT: I haven't gotten to it yet. That is  
11:09:22AM 15 my next question. What is your position on ceasing all  
11:09:26AM 16 communication with the anonymous alleged hacker?

11:09:30AM 17 MR. BLEIMAN: Again, I don't classify him as a  
11:09:34AM 18 hacker. I don't believe that we should be restricted from  
11:09:39AM 19 communicating with a person who clearly has information  
11:09:48AM 20 that they have concealed from us for more than a year.

11:09:51AM 21 And if they communicate to us or provide us with  
11:09:54AM 22 additional images or evidence, I don't -- You know,  
11:10:01AM 23 Mr. Whitaker made various claims about illegal conduct,  
11:10:05AM 24 criminal conduct. I don't know that to be the case.

11:10:11AM 25 Clearly, Mr. Sykes-Bonnett knows exactly who this

1 person is. I think the better solution, in connection  
2 here with these discovery-related issues, is for them to  
3 identify who they believe this may be, provide us with a  
4 list of names, and let's have equal access to try to  
5 figure out who this person is, what they have, and how  
6 they got the information.

7 We have been completely transparent, candid, and  
8 forthright in this entire situation. The same cannot be  
9 said for them. They have hidden all these facts.

10 THE COURT: My only concern here is -- You said  
11 you don't acknowledge this as a hacker. It is not  
12 established as a matter of fact or law in this court that  
13 there was an unauthorized, illegal access to an email  
14 server. But it is of concern to the court if a party is  
15 obtaining information from such an unauthorized, illegal  
16 source.

17 I am not going to restrict your communication with  
18 this anonymous person, because I don't know of any  
19 authority, really, in a civil matter, for a court to issue  
20 sort of a gag order in connection with this. I don't know  
21 who this person is either. Whether they have relevant  
22 information concerning this case, it is perfectly lawful.  
23 I am not going to grant that. I am only cautioning that  
24 this court is concerned with the allegations.

25 MR. BLEIMAN: Understood. Your Honor, on that

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11:12:10AM 1 point, I think it is important to note that the emails  
11:12:15AM 2 that we have produced, that this person provided, suggest  
11:12:22AM 3 a very intricate and detailed knowledge of how the  
11:12:27AM 4 software is created, specific implementation of certain  
11:12:31AM 5 algorithms, the development of the communication protocol,  
11:12:38AM 6 all of which they've admitted to and have disclosed in  
11:12:42AM 7 these declarations. The information is very credible.

11:12:47AM 8 It lends credence to our belief that this is a former  
11:12:53AM 9 partner, programmer, consultant, advisor, someone that was  
11:12:58AM 10 also working with Mr. Sykes-Bonnett who had inside access  
11:13:03AM 11 to all of this information. There was presumably some  
11:13:08AM 12 disagreement or falling out, perhaps, which caused them to  
11:13:12AM 13 come forward and communicate this stuff to us.

11:13:15AM 14 But, again, it gets back to the point of -- And we  
11:13:18AM 15 have asked for this information in discovery. And, yes,  
11:13:21AM 16 the due date isn't there yet. But we have been open and  
11:13:24AM 17 forthright.

11:13:25AM 18 I think they should identify in connection with  
11:13:28AM 19 discovery who the universe of people that they believe  
11:13:31AM 20 this might be, as well as their knowledge of their contact  
11:13:35AM 21 information. Clearly that would be relevant as a  
11:13:40AM 22 supplement to their initial disclosures. It is an issue  
11:13:43AM 23 now in the case. I believe they have an affirmative  
11:13:47AM 24 obligation to provide that type of information to us.

11:13:50AM 25 THE COURT: Another discovery matter. There is

11:13:56AM 1 no order with respect to that, just the court's cautionary  
11:14:02AM 2 statements here.

11:14:03AM 3 The sixth is, "Provide an accounting of all monies,  
11:14:07AM 4 funds, or other form of compensation provided to the  
11:14:09AM 5 hacker." Again, this seems like a reasonable discovery  
11:14:14AM 6 request.

11:14:16AM 7 MR. BLEIMAN: I don't believe so. I think that  
11:14:20AM 8 it is irrelevant. They haven't made that request in  
11:14:25AM 9 discovery. I think if they make that request in  
11:14:28AM 10 discovery --

11:14:29AM 11 THE COURT: If they make it, you refuse it, and  
11:14:31AM 12 there is a motion to compel, the court is going to likely  
11:14:34AM 13 grant it. You say it is not relevant. It could go to the  
11:14:38AM 14 credibility of this informant, that sort of thing.

11:14:41AM 15 MR. BLEIMAN: Sure. Okay.

11:14:43AM 16 THE COURT: I would request that you just simply  
11:14:46AM 17 fulfill this as a discovery request.

11:14:50AM 18 MR. BLEIMAN: Understood.

11:14:51AM 19 THE COURT: Seven, "Refrain from ever again  
11:14:54AM 20 soliciting confidential information from Syked Tuning  
11:14:59AM 21 under circumstances which would lead any reasonable person  
11:15:01AM 22 to believe that such confidential information was likely  
11:15:04AM 23 obtained through illegal means." I am not going to order  
11:15:09AM 24 that. I have already made my comments about the  
11:15:11AM 25 proprietariness of working with somebody who there is

11:15:22AM 1 reason to believe -- a reasonable person would believe  
11:15:28AM 2 that they are trading in illegally-gained information.

11:15:33AM 3 Number 8 is, "Provide an affidavit attesting that HPT  
11:15:38AM 4 and its counsel have complied with each and every one of  
11:15:41AM 5 the foregoing provisions." The same comment I made  
11:15:43AM 6 earlier, your representations made here in court are  
11:15:48AM 7 sufficient for this court, as an officer of the court.

11:15:56AM 8 Now I want to talk about experts. I have already  
11:16:07AM 9 mentioned I would have expected that the parties would be  
11:16:10AM 10 hiring experts -- retained experts under 703 to render  
11:16:20AM 11 opinions with respect to the inclusion of source code and  
11:16:24AM 12 software. But it also seems to me that this issue can be  
11:16:32AM 13 moved along by the appointment of an expert under Rule 706  
11:16:41AM 14 of the rules of evidence.

11:16:50AM 15 I came into this hearing believing that was the  
11:16:54AM 16 better choice. But obtaining a qualified expert is an  
11:16:59AM 17 issue that is in dispute here.

11:17:05AM 18 But if this matter goes to trial, aren't we going to  
11:17:08AM 19 have to have -- we don't have to have, the parties can  
11:17:15AM 20 rely on their own internal programmers, and so forth.  
11:17:21AM 21 Tell me, what's going to happen here? Will experts be  
11:17:26AM 22 retained? Have they been retained on this issue?

11:17:30AM 23 MR. BLEIMAN: Your Honor, we have a motion that  
11:17:33AM 24 is pending on the adjustment of the schedule, including  
11:17:37AM 25 the expert disclosure deadlines. There is actually two

11:17:40AM 1 separate motions. We do contemplate an expert. We have  
11:17:45AM 2 asked in discovery for production of their code so that we  
11:17:54AM 3 can have it analyzed. They haven't produced that despite  
11:18:01AM 4 a number of requests. We have asked for that beta  
11:18:05AM 5 version.

11:18:06AM 6 THE COURT: Has there been a protective order?

11:18:11AM 7 MR. BLEIMAN: Yes.

11:18:11AM 8 THE COURT: So it could be provided under a  
11:18:14AM 9 protective order.

11:18:14AM 10 MR. BLEIMAN: We have reservations of turning our  
11:18:18AM 11 code over in light of everything that has happened.

11:18:20AM 12 THE COURT: I don't know how we go to trial if  
11:18:22AM 13 codes aren't --

11:18:23AM 14 MR. BLEIMAN: There are components of the code,  
11:18:24AM 15 the parameter list issue, the licensing screen issue,  
11:18:30AM 16 there is the ability to support certain vehicles that may  
11:18:37AM 17 not require a complete analysis of all the code, just  
11:18:46AM 18 parts of it.

11:18:47AM 19 But there is a high degree of apprehension here that  
11:18:49AM 20 what we are going to get is the real thing. That's only  
11:18:53AM 21 because of everything that has gone on here in this case  
11:19:02AM 22 and the course of conduct that started in May of 2017 when  
11:19:07AM 23 the issue of -- some of these issues first surfaced. So  
11:19:13AM 24 it is a difficult issue.

11:19:17AM 25 I think if we start with the parameters names that

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11:19:21AM 1 they were supposed to produce long ago, and the beta  
11:19:25AM 2 version, that's a start for us, before getting involved  
11:19:29AM 3 with all the experts and appointing independent experts.  
11:19:35AM 4 We thought we would have that information in March or  
11:19:38AM 5 April, and we still don't have it. Mr. Whitaker has made  
11:19:42AM 6 a number of comments, "Well, let's just turn it over." We  
11:19:48AM 7 don't know that we need to go to that extreme.

11:19:49AM 8 THE COURT: Is that an extreme, or is that maybe  
11:19:52AM 9 the best solution where there are such strong contests, on  
11:20:00AM 10 your part, if not the other, and distrust over this, in  
11:20:03AM 11 which an independent expert, who has fealty to neither  
11:20:08AM 12 party, is more likely to obtain and get the necessary  
11:20:12AM 13 information after consulting with you and your client and  
11:20:17AM 14 with defense?

11:20:18AM 15 MR. BLEIMAN: I don't believe they are mutually  
11:20:20AM 16 exclusive. I think both, perhaps, are the right path. We  
11:20:24AM 17 do need the parameters names that were supposed to be  
11:20:27AM 18 produced long ago. We do need the beta version that was  
11:20:30AM 19 supposed to be produced long ago.

11:20:32AM 20 As far as the independent expert, again, we are very  
11:20:35AM 21 concerned that there isn't really somebody out there,  
11:20:41AM 22 short of a competitor in this industry, that knows this  
11:20:44AM 23 industry, that is going to be able to do it.

11:20:46AM 24 THE COURT: You just a moment ago said you wanted  
11:20:49AM 25 the expert deadline, that you were going to secure an

11:20:53AM 1 expert.

11:20:54AM 2 MR. BLEIMAN: Correct. We haven't yet. We have  
11:20:56AM 3 had difficulty finding that particular person. Also, we  
11:21:02AM 4 have nothing for them to look at, because we don't have  
11:21:04AM 5 any of the information that was supposed to be produced  
11:21:07AM 6 long ago. Until we have the parameters list and we have  
11:21:12AM 7 the beta version, there was nothing even to discuss with  
11:21:17AM 8 any expert.

11:21:18AM 9 There are components of his code that we believe --  
11:21:22AM 10 Excuse me. There are components of our code that have  
11:21:25AM 11 been incorporated into his code. I don't think we are  
11:21:29AM 12 saying, or have ever said, it is an exact duplication.  
11:21:34AM 13 For him to do that would, quite frankly, not be very  
11:21:39AM 14 smart.

11:21:41AM 15 I think there is unquestionably going to be  
11:21:47AM 16 incorporation of components, like I said, the  
11:21:50AM 17 implementation of certain algorithms, and other things,  
11:21:54AM 18 that you will find in his code.

11:21:56AM 19 I also believe that there are -- what we will be able  
11:22:03AM 20 to see is that his use of our admin software and some of  
11:22:07AM 21 the other intellectual property that he had of ours was  
11:22:09AM 22 referenced in connection with the development of his code.

11:22:14AM 23 These products have taken ten-plus years and hundreds  
11:22:22AM 24 of thousands of man hours to put all this together, with  
11:22:27AM 25 multiple people working on this. This is their only

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11:22:32AM 1 engineer, Mr. Sykes-Bonnett. There is just simply not  
11:22:35AM 2 enough time in the day to do everything that he has done  
11:22:40AM 3 without incorporation of our stuff.

11:22:45AM 4 That is, I think, a fundamental disconnect here that  
11:22:48AM 5 exists, that it is just not possible. Where is the  
11:22:53AM 6 evidence of who his development people are, and the amount  
11:22:56AM 7 of money he spent in development, and all the engineers  
11:22:59AM 8 that have been working on this? It doesn't exist because  
11:23:02AM 9 he doesn't have it.

11:23:05AM 10 We can put our people up on the stand and testify in  
11:23:10AM 11 terms of what it took, what it involved, how intensive it  
11:23:14AM 12 was to develop all of these things, and he can't.

11:23:20AM 13 You know, even with -- The expert will certainly  
11:23:24AM 14 assist, but there is also party evidence and testimony  
11:23:28AM 15 that is going to be presented that will, I think,  
11:23:34AM 16 demonstrate that there is just no way, there is just no  
11:23:39AM 17 way.

11:23:39AM 18 THE COURT: Even if I assume all of that is true,  
11:23:45AM 19 and it seems we are talking about complicated computer  
11:23:52AM 20 programming software, and so forth, that took years to  
11:23:56AM 21 develop, that doesn't answer the question about whether it  
11:24:02AM 22 is preserved as trade secrets, what is open in the  
11:24:06AM 23 industry, reverse-engineering, all sorts of other  
11:24:09AM 24 potential defenses.

11:24:16AM 25 I want to hear, Mr. Whitaker, just briefly about the

11:24:19AM 1 discovery issue. That may not be ripe, but if we are  
11:24:25AM 2 going to proceed here, these things do need to be  
11:24:29AM 3 disclosed. There is a protective order in place.

11:24:32AM 4 MR. WHITAKER: True, your Honor. One at a time.  
11:24:35AM 5 As to the experts, prior to the expert deadline, as it  
11:24:38AM 6 existed in the past, we had lined up two experts who were  
11:24:41AM 7 prepared to testify. It is not that hard. I can give you  
11:24:44AM 8 their names. We had two ready to testify. Because we  
11:24:47AM 9 didn't have the burden of proof, we just didn't. The  
11:24:51AM 10 discovery deadline came and went.

11:24:53AM 11 As to the production, it is unfair to say we were  
11:24:59AM 12 supposed to produce anything. They have asked for beta  
11:25:01AM 13 software. What we have told them is we will either make  
11:25:04AM 14 it available for inspection in some certain instances or  
11:25:08AM 15 we will provide it to an expert that you designate. No  
11:25:10AM 16 such expert has been designated.

11:25:12AM 17 The reason we are here, our TRO --

11:25:15AM 18 THE COURT: Why do we limit it to just an expert?  
11:25:19AM 19 In other words, they have internal expertise to evaluate  
11:25:22AM 20 and analyze that. I recognize that all of this generates  
11:25:29AM 21 concern about trade secrets going back the other way, and  
11:25:34AM 22 so forth. That's why we have protective orders. They are  
11:25:38AM 23 not perfect, but that's how we proceed in litigation.

11:25:42AM 24 MR. WHITAKER: True, your Honor. If we'd  
11:25:44AM 25 envisioned sort of an exchange of -- We would ask that a

11:25:47AM 1 very tailored protective order -- additional protect --  
11:25:51AM 2 source code protective order be in place to deal with  
11:25:54AM 3 exactly how that code is used and who can use it. It is  
11:25:56AM 4 more common to have tighter control over the exchange of  
11:26:00AM 5 source code.

11:26:01AM 6 This unilateral concept, as we have demonstrated, and  
11:26:05AM 7 it goes undisputed -- Syked Tuning software was in  
11:26:08AM 8 existence years before this dispute arose, with no  
11:26:11AM 9 allegation whatsoever that anything came from HP Tuners.  
11:26:14AM 10 That's been --

11:26:14AM 11 THE COURT: I understand.

11:26:15AM 12 MR. WHITAKER: That has been around. This fear,  
11:26:17AM 13 that, "Oh, if Syked ECU Tuning sees HP Tuners code, that's  
11:26:24AM 14 the end of the world," but, you know, they should have  
11:26:26AM 15 unfettered access to everything he has done, that -- In  
11:26:31AM 16 view of the purchase of confidential information from  
11:26:34AM 17 anonymous sources, the judgment there that it will be  
11:26:37AM 18 safeguarded -- that trade secrets will be safeguarded by  
11:26:41AM 19 employees of HP Tuners is simply too great to justify that  
11:26:45AM 20 manner of --

11:26:46AM 21 THE COURT: All right. I believe this case is  
11:26:52AM 22 going to be advanced best by the appointment of an expert.  
11:27:01AM 23 Expenses will be shared. This is under Rule 706 of rules  
11:27:07AM 24 of evidence.

11:27:08AM 25 What I am going to require the parties to do is to

11:27:13AM 1 meet and confer and see if you can agree upon an expert to  
11:27:21AM 2 appoint, the scope of instructions, consulting 706 here.  
11:27:35AM 3 I want to be optimistic that the parties can reach an  
11:27:39AM 4 agreement with respect to the scope there.

11:27:42AM 5 I am really thinking about the source code and the  
11:27:47AM 6 software. That's where the key dispute is that would  
11:27:54AM 7 benefit from an expert in the field.

11:27:59AM 8 I would imagine that this expert also would sort of  
11:28:03AM 9 look like a special master, in the sense that the parties  
11:28:07AM 10 will be able to advocate to the expert their position, and  
11:28:11AM 11 so forth, so that the expert understands what the relative  
11:28:15AM 12 positions are and can make an assessment.

11:28:21AM 13 If the parties are unable to agree on an expert, each  
11:28:25AM 14 is to identify an expert from which -- with, of course, a  
11:28:31AM 15 curriculum vitae. And the court will appoint one or the  
11:28:37AM 16 other. I strongly encourage counsel to find someone that  
11:28:43AM 17 they can agree upon. I am not fond of having to appoint  
11:28:50AM 18 one expert named by one person. That's what it will have  
11:28:54AM 19 to be if you are unable to reach an agreement.

11:28:59AM 20 The timeline for that, again, I think a week from  
11:29:06AM 21 today should be sufficient for you to work out the  
11:29:09AM 22 appointment and the designated scope of work.

11:29:18AM 23 MR. WHITAKER: Your Honor, if I may? My  
11:29:21AM 24 sincerest apologies, but a week from today may be  
11:29:24AM 25 difficult. My daughter is getting married this weekend,

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11:29:26AM 1 and I have a ton of family in town. Could we have the  
11:29:29AM 2 following Monday?

11:29:32AM 3 THE COURT: Sure. The following Monday. And  
11:29:37AM 4 then, of course, if you are unsuccessful in reaching an  
11:29:40AM 5 agreed submission, then each party will make a proposal  
11:29:44AM 6 for not only the expert but what the scope of that  
11:29:48AM 7 expert's work should be. That would be done at the same  
11:29:58AM 8 time. Given that, I am going to make it two weeks from  
11:30:01AM 9 today. I will give you another couple of days, because I  
11:30:06AM 10 realize there is some work there.

11:30:08AM 11 And then the court will try to expeditiously, if  
11:30:12AM 12 there is not an agreement, resolve as to who the expert  
11:30:18AM 13 will be. The cost will be borne equally by the parties.

11:30:25AM 14 The preliminary injunction hearing, we talked about  
11:30:31AM 15 ten weeks --

11:30:34AM 16 MR. BLEIMAN: Your Honor, may I be permitted?

17 THE COURT: Yes.

11:30:34AM 18 MR. BLEIMAN: Your Honor, in light of the  
11:30:38AM 19 concessions that the defendants made, and your order not  
11:30:42AM 20 to prohibit the sales, perhaps Mr. Whitaker and I should  
11:30:49AM 21 confer on this, because I don't really think the things  
11:30:54AM 22 that are being ordered with relation to our IP and the  
11:30:57AM 23 return of it and the non-use of it really would  
11:31:00AM 24 necessitate --

11:31:03AM 25 THE COURT: A preliminary injunction hearing.

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11:31:06AM 1 MR. BLEIMAN: I think that is probably an order  
11:31:07AM 2 that can probably be in place -- It sounds like it's  
11:31:14AM 3 agreed. Maybe that is something that should be conferred  
11:31:19AM 4 about. Is that fair?

11:31:20AM 5 MR. WHITAKER: Perhaps we should confer. I am  
11:31:24AM 6 not exactly sure what -- So we are going to appoint an  
11:31:28AM 7 expert -- identify an expert to evaluate. But then what?

11:31:32AM 8 THE COURT: That's it. It seems to me there will  
11:31:36AM 9 be a product produced there. I anticipated this  
11:31:41AM 10 primarily, of course, in connection with anticipated  
11:31:43AM 11 preliminary injunction on the source code issue.

11:31:52AM 12 MR. BLEIMAN: That really just goes to the  
11:31:54AM 13 overall merits of the whole case. I mean, really, one of  
11:31:59AM 14 the claims here relates to the source code. So to have  
11:32:05AM 15 two trials, potentially, on that issue, one in connection  
11:32:08AM 16 with the preliminary injunction and one in connection with  
11:32:11AM 17 the --

11:32:11AM 18 THE COURT: That is your call to make. It is  
11:32:13AM 19 your motion. If a preliminary injunction can be  
11:32:20AM 20 avoided -- If that's the case, then I don't know that the  
11:32:24AM 21 court needs to be appointing an expert to prepare for a  
11:32:26AM 22 preliminary injunction. That sort of obviates the need,  
11:32:31AM 23 it seems to me. If we are not going to have a preliminary  
11:32:33AM 24 injunction, this is going to be the status of temporary  
11:32:38AM 25 relief.



11:32:40AM 1 MR. BLEIMAN: Can I confer with my client?

11:32:42AM 2 THE COURT: Certainly.

11:33:07AM 3 MR. BLEIMAN: I think what -- Mr. Whitaker made  
11:33:15AM 4 a comment before, this beta version of the software that  
11:33:18AM 5 we asked for, that they had said was going to be produced,  
11:33:20AM 6 was a publicly-released version of the software. It is  
11:33:23AM 7 not something that is private. I don't think it would  
11:33:30AM 8 warrant any protective order -- source code protective  
11:33:33AM 9 order or anything like that. That's what we asked for in  
11:33:36AM 10 discovery. It hasn't been provided, this  
11:33:39AM 11 publicly-released beta version.

11:33:42AM 12 I think with that publically-released --

11:33:42AM 13 THE COURT: Well, that doesn't have a source  
11:33:45AM 14 code --

11:33:48AM 15 MR. BLEIMAN: But we can look at it to see -- to  
11:33:50AM 16 make a determination in terms of the duplication or  
11:33:53AM 17 incorporation of our source code into that beta version,  
11:33:59AM 18 his software, if we can get a copy of that. Again, this  
11:34:04AM 19 isn't private. It was publicly released. We have asked  
11:34:07AM 20 for it. They had indicated they would produce it.

11:34:10AM 21 THE COURT: It needs to be produced.

11:34:12AM 22 MR. WHITAKER: If I may, your Honor? The  
11:34:14AM 23 statement that it was publicly released is flatly untrue.  
11:34:19AM 24 It was not. It was a beta version. Beta, in the software  
11:34:22AM 25 context, indicates that it is not a final version.

11:34:25AM 1           This particular version that they are discussing, the  
11:34:27AM 2           entirety of their knowledge of it comes from one post on  
11:34:30AM 3           Facebook, where Mr. Sykes-Bonnett said, "Hey, we have  
11:34:34AM 4           another version we may be releasing." It has not been  
11:34:36AM 5           released. It has never been released. If it were  
11:34:39AM 6           released to the public, they wouldn't have to ask us for  
11:34:42AM 7           it.

11:34:42AM 8           THE COURT: Even if that's so, it does need to be  
11:34:45AM 9           produced.

11:34:45AM 10          MR. WHITAKER: Again, your Honor, in the context  
11:34:47AM 11          of some assurances that that information won't find its  
11:34:51AM 12          way into the next version of HP Tuners' software.

11:34:54AM 13          THE COURT: Again, this is what protective orders  
11:34:56AM 14          are about. You will have to craft one. If you can't  
11:34:58AM 15          agree on one, which I will be highly disappointed, the  
11:35:03AM 16          court will have to take that up and craft a protective  
11:35:09AM 17          order. Those are legitimate concerns, but this happens in  
11:35:13AM 18          intellectual property cases all the time.

11:35:16AM 19          MR. BLEIMAN: The protective order is in place,  
11:35:18AM 20          and it contemplates what's provided can be used solely in  
11:35:21AM 21          connection with this litigation. That's how we would use  
11:35:25AM 22          it.

11:35:27AM 23          The public -- the first public release of their  
11:35:30AM 24          software is what we want to see. Again, I don't know that  
11:35:34AM 25          there is these confidentiality concerns. I understand

11:35:39AM 1 what we can use it for, and my client understands what it  
11:35:43AM 2 can be used for and can't be used for. But it is  
11:35:46AM 3 something that can be produced.

11:35:47AM 4 Now, I think that we can -- if we can get that here  
11:35:52AM 5 in a timely manner, and do that analysis, we may not need  
11:35:56AM 6 to go forward with the preliminary injunction on that  
11:36:01AM 7 issue.

11:36:02AM 8 THE COURT: When is the trial date?

11:36:06AM 9 MR. BLEIMAN: Currently, again, we have a pending  
11:36:09AM 10 motion to modify the dates. It is January 19th, I want to  
11:36:13AM 11 say, of next year.

11:36:15AM 12 THE COURT: And the time for designating experts  
11:36:18AM 13 has passed under the current schedule?

11:36:20AM 14 MR. BLEIMAN: Correct.

11:36:20AM 15 THE COURT: And that is part of your  
11:36:23AM 16 modification, right?

11:36:23AM 17 MR. BLEIMAN: Correct. As well as the discovery  
11:36:27AM 18 disclosure and the dates. Essentially we were -- Again,  
11:36:31AM 19 the motion to compel and modify the schedule lays it out.  
11:36:34AM 20 But there has been this cover up and concealment and  
11:36:38AM 21 misdirection throughout this entire case. We got this  
11:36:41AM 22 information on August 5th, and now we want the discovery  
11:36:45AM 23 we have asked for. We want to be able to take the  
11:36:48AM 24 depositions of --

11:36:50AM 25 THE COURT: So if the court extends and modifies

11:36:53AM 1 the deadline for identification of experts, and maybe that  
11:36:57AM 2 implicates a trial continuance --

11:37:01AM 3 MR. BLEIMAN: Correct.

11:37:01AM 4 THE COURT: -- then it would seem that the  
11:37:05AM 5 appointment of an expert by the court would be  
11:37:10AM 6 unnecessary, because we are not going to have a  
11:37:12AM 7 preliminary injunction hearing, we are going to move  
11:37:14AM 8 straight to the trial.

11:37:16AM 9 MR. BLEIMAN: Correct.

11:37:17AM 10 THE COURT: Mr. Whitaker, I think that is the way  
11:37:19AM 11 we should proceed.

11:37:20AM 12 MR. WHITAKER: Certainly, your Honor. We would  
11:37:22AM 13 ask that the court entertain a motion for an additional  
11:37:26AM 14 protective order directed directly at certain software.  
11:37:31AM 15 What they have asked for isn't ready for release. There  
11:37:35AM 16 are a lot of problems with turning it over to any employee  
11:37:38AM 17 of HP Tuners. In connection with that request, since it  
11:37:45AM 18 is effectively brand new, that's the relief we would ask  
11:37:49AM 19 for. I can fashion a motion --

11:37:53AM 20 THE COURT: You can make a motion for a  
11:37:54AM 21 protective order. What I'm saying -- The court is moving  
11:37:58AM 22 toward granting a motion to compel the production of this  
11:38:02AM 23 software. And I believe, in the interest of justice, if  
11:38:13AM 24 this case is going to get a fair hearing, the schedule is  
11:38:18AM 25 going to have to be continued in order to have the parties

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11:38:21AM 1 have experts analyze this software.

11:38:27AM 2 MR. WHITAKER: Yes, your Honor.

11:38:32AM 3 THE COURT: So no appointed expert. There will  
11:38:35AM 4 be a motion if the parties haven't been able to agree on  
11:38:41AM 5 an ordinarily tailored protective order in connection with  
11:38:44AM 6 this particular disclosure. Failing that, there will be a  
11:38:48AM 7 motion filed for the court to resolve it. We will  
11:38:56AM 8 probably do that over a telephone conference if it is  
11:38:59AM 9 disputed. The parties, otherwise, are going to work  
11:39:06AM 10 toward the order that I talked about.

11:39:12AM 11 MR. BLEIMAN: Okay. As far as -- I mean, the  
11:39:16AM 12 other pending motions, they have time to respond to them.

11:39:21AM 13 THE COURT: They do. Again, I think this is an  
11:39:23AM 14 area -- Let's have agreement. Let's not have to have the  
11:39:27AM 15 court resolve it. I have already communicated to you  
11:39:34AM 16 where the court is likely headed on this. It is much  
11:39:38AM 17 better if the parties sit down and agree than leave it to  
11:39:42AM 18 the court. I think I have telegraphed to you where I  
11:39:48AM 19 think this is likely to go anyway.

11:39:51AM 20 MR. BLEIMAN: Understood. In terms of the  
11:39:52AM 21 scheduling order, would you like us to submit a new  
11:39:54AM 22 proposed scheduling order to the court?

11:39:57AM 23 THE COURT: Yes. If the January date doesn't  
11:40:02AM 24 work because of the dispositive motion deadline, expert --  
11:40:12AM 25 In other words, even if we extended the expert deadline

11:40:14AM 1 now, it seems to me the other deadlines wouldn't work. I  
11:40:19AM 2 think we are looking at a continuation of the trial date.  
11:40:21AM 3 I don't think it has to be long.

11:40:26AM 4 MR. BLEIMAN: I think I put in the motion three  
11:40:30AM 5 or four months. I can't remember exactly. But I think  
11:40:33AM 6 maybe May I put -- sometime in May.

11:40:38AM 7 THE COURT: That might be able to be agreed to,  
11:40:40AM 8 earlier. A couple of months -- Sometime in March --

11:40:45AM 9 MR. BLEIMAN: I tried to move all of the dates  
11:40:47AM 10 back accordingly. We can revisit that.

11:40:50AM 11 THE COURT: All right. I will hope to see an  
11:40:57AM 12 agreed order on amended scheduling order. Again, failing  
11:41:02AM 13 agreement, then the parties will submit --

11:41:05AM 14 MR. WHITAKER: I have the court's intent on the  
11:41:08AM 15 pending motion to compel all of this software and other  
11:41:12AM 16 documents on the defendants' behalf. There is another  
11:41:16AM 17 pending motion where we have requested some documents in  
11:41:19AM 18 connection with an arbitration that simply haven't been  
11:41:21AM 19 produced. It is unrelated. It is essentially a lot of  
11:41:24AM 20 communications pertaining to someone else named Matt  
11:41:27AM 21 Honeycutt, the first person sued in connection with all of  
11:41:30AM 22 these disputes. We are hopeful that that motion can stay  
11:41:33AM 23 on the calendar for consideration.

11:41:35AM 24 THE COURT: It is. I haven't really looked at  
11:41:37AM 25 it. It can remain.

11:41:45AM 1 I think we have exhausted the better part of two  
11:41:50AM 2 hours here. It has been a good hearing. I encourage  
11:41:55AM 3 cooperation.

11:41:56AM 4 Having recently married off a daughter, the fourth  
11:42:01AM 5 one, I wish you well.

11:42:04AM 6 MR. WHITAKER: Thank you, your Honor.

7 (Proceedings concluded.)  
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## C E R T I F I C A T E

I, Barry Fanning, Official Court Reporter for the  
United States District Court, Western District of  
Washington, certify that the foregoing is a true and  
correct transcript from the record of proceedings in the  
above-entitled matter.

/s/ Barry Fanning  
Barry Fanning, Court Reporter